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No. 90-615

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

RAFAEL PERETZ,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONER'S REPLY BRIEF

JOEL B. RUDIN
MASS & RUDIN
598 Madison Avenue, 15th Floor
New York, New York 10022
(212) 753-8700

RICHARD W. LEVITT
148 East 78th Street
New York, New York 10021
(212) 737-0400

JOEL BRENNER *
76 Tompkins Street
East Northport, New York 11731
(516) 757-9189
Counsel for Petitioner

* Counsel of Record

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PETITIONER'S REPLY BRIEF

INTRODUCTION

Respondent's brief acknowledges that Congress, which has sole authority under Art. III to determine a magistrate's jurisdiction, precluded magistrates from presiding at felony voir dire regardless of the parties' consent. Having conceded that there was a substantive error—and thus sidestepping two of the three questions the Court had directed the parties to address [1]—respondent nevertheless attempts to salvage its case by wrongly blaming petitioner for not lodging a contemporaneous objection. But respondent's theory that this is a "plain error" case has a gaping flaw: plain error analysis only applies where

[1] The two questions were whether the delegation violated the Federal Magistrates Act and, if not, whether it violated Art. III.

an issue is otherwise unpreserved for appeal. Here, the error is preserved for appeal for three reasons:

I. The district court failed to comply with the *Johnson v. Zerbst*, 304 U.S. 458 (1938), "knowing, intelligent and voluntary" waiver standard explicitly adopted by Congress for magistrate trials in misdemeanor and petty offense cases. Congress did not expressly adopt this stringent standard for felonies only because Congress completely precluded *any* felony trial jurisdiction for magistrates. At the very least, the Court should hold that a defendant's right to appeal in a felony case is preserved absent compliance with the statutory waiver requirement for less significant misdemeanor and petty offense cases.

II. By "exceed[ing] his jurisdiction," *Gomez v. United States*, 490 U.S. 858, 876 (1989), the magistrate violated Art. III's express reservation for Congress of the responsibility to create and to define the jurisdiction of the lower federal courts and its officers. Congress precluded consent felony trial jurisdiction for magistrates "in the interests of policy as well as constitutional constraints," *id.* at 872, but the magistrate here exercised it anyway at the district court's behest. This was a clear "structural" violation that petitioner may raise on direct appeal regardless of his position below.

III. As we argued extensively in Point II of our opening brief, an individual criminal defendant cannot "waive" structural and societal interests underlying Art. III's textual requirement that the "judicial Power" be exercised by fully-independent Art. III judges. Respondent's proposed case-by-case test for evaluating whether a structural violation has occurred would negate Art. III altogether by permitting delegation of entire felony trials to magistrates, law clerks, even citizens off the street, so long as no discrete error identified by a party at trial goes "uncorrected." It also disregards the recognition in *Gomez* that voir dire is inherently immune from independent or *de novo* review.

The effect of the error that concededly occurred in this case can be corrected without undermining the jurisdiction of magistrates to preside at civil and misdemeanor trials. A conclusion that the error requires a new trial because the magistrate, as in *Gomez*, "exceeded his jurisdiction," or because petitioner did not validly waive his right to have a district judge preside at voir dire, would leave for another day the more vexing question whether Congress has the inherent power under Art. III to authorize such a delegation. Under existing *res judicata* and retroactivity principles, neither of the above holdings would require collateral relief for defendants whose convictions became final before *Gomez* was decided in June 1989. Even a broader holding that magistrate-conducted felony voir dire is an inherent Art. III violation would not require the same result for misdemeanor or civil trials. *See infra* at 14-15 n.8.

ARGUMENT

I. RESPONDENT'S BRIEF IGNORES AND WOULD NEGATE CONGRESS' EFFORT TO ESTABLISH WHEN AND BY WHAT STANDARD A DEFENDANT'S RIGHT TO THE PRESENCE OF A DISTRICT JUDGE AT TRIAL MAY BE WAIVED

Respondent concedes that Congress may impose a waiver procedure or standard that is stricter than the Constitution would require. *See* Brief for United States 38 n.18 ("Statutes and rules require the personal consent of the party as a precondition of the valid waiver of certain other rights . . . that go beyond the few rights in which this Court has required personal consent for a valid waiver . . ."). Consistent with this view, the lower courts have held that a litigant's waiver that fails to substantially comply with the Magistrates Act's consent requirements cannot preclude the litigant from complaining on appeal. *See* Pets. Brf. 40 n.22.

Respondent's brief totally ignores the significance of Congress' incorporation into the Magistrates Act of the *Johnson v. Zerbst* waiver standard, with an additional writing requirement, for misdemeanor and petty offense trials. *See Gomez*, 490 U.S. at 870 ("the magistrate's criminal trial jurisdiction depends on the defendant's specific, written consent"); 18 U.S.C. § 3401; Pets. Brf. 41-42. While Congress set up no felony waiver procedure because it had forbidden magistrates from exercising felony trial jurisdiction altogether, it defies logic to suggest that Congress would have been content with a looser test for felonies than for petty offenses. *See United States v. Martinez-Torres*, 912 F.2d 1552, 1556 (1st Cir. 1990) (en banc) ("The statutory concept of requiring defendant's written consent, even for a misdemeanor trial, necessarily negates waiver, even oral consent, by counsel for an uninformed defendant in a felony case."). To the contrary, by completely precluding magistrates from ever exercising consent trial jurisdiction over felonies, Congress made a felony defendant's right to the presence of an Art. III judge immune from waiver. However, the Court need not reach this issue, since respondent does not argue that petitioner's counsel's oral "waiver" satisfied even the *Johnson v. Zerbst* standard.

Respondent's all-out effort to convince this Court to employ the plain error rule simply ignores that the waiver standard can be no less stringent in this felony case than Congress decreed for petty offenses. Additionally, even absent Congress' establishment of an appropriate waiver standard, application of *Johnson v. Zerbst* to judge-conducted voir dire is mandated by the fundamental structural nature of the right. Thus, the Court unanimously recognized in *Gomez* that the "right to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside," including voir dire, is "basic." 490 U.S. at 876. *Cf. Powers v. Ohio*, 59 U.S.L.W. 4268, 4272 (April 1, 1991) (an "irregularity"

in the selection of the jury "may pervade all the proceedings that follow"). It is too late for respondent to maintain that the right to the presence of an officer with "jurisdiction to preside" is no more significant than the tactical decision by counsel during trial to forego cross-examination of a particular witness. Brf. 41; *see* discussion in Pets. Brf. 43-44. Even *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977), upon which respondent relies (Brf. 13-14), premises its plain error analysis upon the presence of "the judge . . . on the bench."

The above analysis also defeats respondent's "invited error" argument. None of the cases respondent cites involve the types of rights that must be affirmatively waived by a criminal defendant personally, but rather attorneys' tactical decisions during trial by which clients traditionally are bound.[2]

No matter how often respondent characterizes trial counsel's "consent" as a shrewd ploy to plant or to "invite" reversible error and attributes that ploy to petitioner, its argument rings false. The trial court's request for counsel's consent made plain the Court's desire to refer jury selection to a magistrate. We already have shown, and respondent does not contest, that at the time of the request, October 14, 1988, the Second Circuit did not recognize the "right" to have a judge preside, and the district courts' practice was to override defendants' objections. In view of those circumstances, counsel's ingratiating response should be seen as an attempt to make the best of the situation since, contrary to respondent's argument (Brf. 16), the district court almost cer-

[2] The lower court cases relied on stand for the unremarkable proposition that, in evidentiary matters over which the trial court has broad discretion, certain unilateral statements by the defense permit the prosecution to use or respond with evidence that otherwise might not be admissible. Here, the suggestion that a magistrate conduct the voir dire came from the judge himself, and involved a structural, not an evidentiary, error.

tainly would *not* have respected counsel's choice.[3] Had counsel been thinking of making an appellate record, he would have shrugged or simply responded, "Yes"; he would not have made a remark so quotable that it appears countless times in respondent's brief. In any event, the government shares responsibility with the district court for failing to ensure that this foreign-born, non-English-speaking criminal defendant understood the then-unrecognized "right" his attorney was waiving.[4]

II. RESPONDENT FAILS TO DISTINGUISH THE NUMEROUS CASES HOLDING THAT A LITIGANT ON DIRECT APPEAL MAY RAISE A JUDICIAL OFFICER'S VIOLATION OF CONGRESSIONAL LIMITATIONS ON THE OFFICER'S JURISDICTION

Whether a federal tribunal has subject matter jurisdiction requires a two-step analysis:

> Federal courts are not courts of general jurisdiction; they have only the power that is authorized by [1] Article III of the Constitution and [2] the statutes enacted by Congress pursuant thereto.

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[3] *Gomez*, in which the defendants' objection was overridden, illustrates this point, as does the jury selection transcript in another case, *United States v. Ming Hoi Wong*, 88 Cr. 93 (JMM) (E.D.N.Y.) (Dec. 12, 1988). The transcript, which is appended to petitioner Peretz's appendix in the court of appeals, shows that the magistrate asked if the defendant had "any objection to my picking the jury?", and when counsel then did object, the magistrate, despite being aware of the pending *cert.* petition in *Gomez*, conducted the voir dire anyway. *See* Appendix for Appellant 45. Significantly, the magistrate whose evident policy it was to seek consent solely to make an appellate record, and to then conduct the voir dire regardless of the defendant's response, was the Chief Magistrate of the Eastern District of New York.

[4] Respondent speculates that "petitioner" may have realized that "[a] particular magistrate" might have been more favorable to him than the district judge. Brf. 5. However, at the time counsel initially agreed to the delegation, no one knew which of the numerous magistrates sitting in the Eastern District of New York ultimately would receive the assignment nearly two months later.

Bender v. Williamsport Area School Dist., 475 U.S. 534, 541 (1986). *See* discussion in Pets. Brf. 38-39.

It is *at least* true, as the government concedes (Brf. 24), that "the district court had no authority under the Magistrates Act to refer jury selection to a magistrate." But it is also true that, in exercising such "authority" after it had been unlawfully "delegated," the magistrate asserted "jurisdiction" over the subject matter of petitioner's felony trial.[5] Even if Art. III would have permitted Congress to empower magistrates to exercise this historic Art. III function, a proposition we dispute in Point II of our opening brief and *infra* at Point III, Congress did not do so. Thus, at the very least, the second prong of the *Bender* two-part test was not satisfied. The district court's delegation of power, and the magistrate's assertion of it, exceeded statutory authority and therefore violated Art. III.

Respondent argues that the above jurisdictional error did not deprive the district court of subject matter jurisdiction over the balance of the case, and that therefore it had power to enter a binding final judgment. Brf. 25. But whether such a judgment would be binding upon a defendant whose conviction became final long ago is a far broader issue than whether petitioner may raise the defect on direct appeal, when *res judicata* concerns are not present.[6]

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[5] Respondent's effort to distinguish between the terms "jurisdiction" and "authority," and to suggest that the Court, when it used "jurisdiction," somehow meant "authority," makes no sense. "Criminal jurisdiction" is "the *authority* by which judicial officers take cognizance of and decide criminal cases." Black's Law Dictionary (4th ed. rev. 1968) (emphasis added). The terms, in this context, are synonomous.

[6] Contrary to respondent's erroneous statement (Br. 25), we did not concede at page 40 of our opening brief that the district court retained subject matter jurisdiction to issue a binding judgment as a consequence of the serious jurisdictional error that occurred dur-

In *Glidden Company v. Zdanok*, 370 U.S. 530 (1962), an obviously relevant case that our opening brief raises and respondent ignores, Justice Harlan's opinion reached the merits of claims that non-Art. III officers had improperly participated in the determination of cases properly before Art. III tribunals, even though the complaining parties had not objected below.[7] As in this case, the *Glidden* petitioners alleged that non-Art. III officers had improperly adjudicated matters over which the delegating Art. III courts unquestionably had subject matter jurisdiction. In determining to reach the merits, the Court focused on whether the challenged judicial officer had improperly exercised Art. III judicial power, not on the Art. III jurisdiction of the court that had made the delegation. As Justice Harlan explained:

> [W]hen the statute claimed to restrict authority is not merely technical but embodies a strong policy concerning the proper administration of judicial business, this Court has treated the alleged defect as "jurisdictional" and agreed to consider it on direct review even though not raised at the earliest practicable opportunity. . . .
>
> The alleged defect of authority here relates to basic constitutional protections designed in part for the benefit of litigants. It should be examinable at least on direct review, where its consideration encounters none of the objections associated with the principle of *res judicata*, that there be an end to litigation. At the most is weighed in opposition the disruption to sound appellate process entailed by entertaining objections not raised below, and that is plainly insufficient to overcome the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers.

Id. at 535-36 (citation omitted). *See Lamar v. United States*, 241 U.S. 103, 117-18 (1916) (petitioner's claim that intercircuit judicial assignment had violated presidential appointing power under Art. II, § 2 was permitted to be raised for the first time in a supplemental brief in the Supreme Court) (favorably cited in *Glidden*); *McClaughry v. Deming*, 186 U.S. 49, 66 (1902) (objection to an improperly constituted military tribunal could be raised initially on appeal.

The violation of the Magistrates Act that occurred in the present case obviously implicates "a strong policy concerning the proper administration of judicial business." *Glidden, supra.* The improper practice of using magistrates to conduct felony voir dire with litigant "consent" became widespread in part because the courts of appeal declined to decide the issue wherever the appellant had failed to object. *See, e.g., United States v. DeFiore*, 720 F.2d 757 (2d Cir. 1983), *cert. denied*, 466 U.S. 906 (1984); *United States v. Rivera-Sola*, 713 F.2d 866 (1st Cir. 1983). Unless a party such as petitioner is permitted to raise such a claim on appeal, the appellate courts cannot ensure "the proper administration of judicial business."

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ing the trial of this case. *See, e.g., Burnham v. Superior Court*, 110 S. Ct. 2105, 2109 (1990) (traditionally a proceeding " 'before a person not a judge' . . . was not a *judicial* proceeding because lawful judicial authority was not present, and could therefore not yield a *judgment*") (emphasis in original). We merely observed that the Court does not have to find the judgment to be void to permit petitioner to appeal the jurisdictional error that occurred during voir dire. Moreover, as we suggested in our opening brief, this Court's repeated invocation of the interest of finality in litigation, which is especially strong in criminal cases, might well lead this Court not to allow non-objecting defendants whose convictions were final at the time *Gomez* was decided to obtain collateral relief. *See* Pets. Brf. 40 n.21; *Glidden Company v. Zdanok*, 370 U.S. 530, 535-36 (1962).

[7] While Justice Harlan wrote for a plurality of three, the other four justices who participtaed in deciding the case also reached the merits and did not question that the claimed jurisdictional error could be raised on direct appeal despite the absence of contemporaneous objection below.

Similarly, allowing petitioner to raise the error is essential to permit the Court to vindicate "the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers." *Glidden*, *supra*. In exercising its exclusive authority under Art. III to define the jurisdiction of magistrates, Congress acted "in the interests of policy as well as constitutional constraints." *Gomez*, 490 U.S. at 872 (footnote omitted). Congress concluded that the public interest in having life-tenured Art. III judges preside at felony trials was too great to entrust to individual litigants with far narrower concerns. By delegating voir dire notwithstanding this judgment, the district court negated Congress' considered judgment. Such an error clearly involves separation of powers. *Cf. Morrison v. Olson*, 487 U.S. 654, 673-76 (1988) (the Appointments Clause, Art. II, § 2, gives Congress exclusive power to authorize the appointment and to define the authority of inferior officers).

Respondent's reliance upon *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986), for its structural argument clearly is misplaced. Brf. 25. In *Schor*, the complaining party had voluntarily availed itself of a specialized, non-Art. III forum *expressly created by Congress* to adjudicate a narrow class of public and related rights. The sole issue was whether Art. III permitted Congress to create such a voluntary, alternative dispute-resolution forum—the first prong of the *Bender* test—not whether, as in this case, a non-Art. III tribunal could be employed even though Congress had withheld authority from it. Moreover, *Schor* did consider the merits of the party's structural Art. III claim because, as in this case, important separation of powers issues were raised. Respondent cites no case in which the Court has declined to entertain a litigant's challenge because he had failed to object to a tribunal's violation of a statute involving subject matter jurisdiction.

Respondent's exclusive focus on the jurisdiction of the court making the delegation would completely undermine Congress' role in granting jurisdiction. Under respondent's reasoning, Congress' effort to circumscribe the jurisdiction of magistrates would be rendered futile because express statutory limitations may be overridden by a district court acting with the parties' consent. Indeed, respondent's notion of inherent judicial authority would remove the necessity of having any Magistrates Act at all. So long as a court with subject matter jurisdiction reserved for itself the ritual of formally entering the final order or judgment, it could refer any adjudicatory function to a court employee such as a magistrate or a clerk. Each such instance, in respondent's view, would be immune from appellate review—and from appellate supervision—both because the delegating court had subject matter jurisdiction and because the litigant, by "consenting," had waived his right to complain.

Respondent's brief is striking for its failure to consider whether an entire felony trial may be delegated to a magistrate without implicating Art. III structural concerns. It would be difficult to make a principled distinction between delegation of an entire trial, save the task of entering judgment, and a "critical" stage such as voir dire. However, even respondent's grudging concession that societal interests would be offended by delegating the trial to a "visiting high school civics class" (Brf. 20) undercuts its argument that no cognizable Art. III interests are involved besides those that are personal to, and therefore waivable by, the defendant.

This Court should hold that any mistaken assertion of authority over a particular subject matter by a magistrate or other officer is a jurisdictional error that a party may raise for the first time on direct appeal. While reversal would not necessarily be required where the jurisdictional violation was *de minimus*, this Court in *Gomez* refused to apply "harmless error" analysis to the use of a

magistrate to preside at felony voir dire when Congress had forbidden magistrates to perform that "critical" trial function. 490 U.S. at 876. If, as we contend, the error here is preserved for review, *Gomez* controls and petitioner's conviction must be reversed.

III. PETITIONER COULD NOT WAIVE INHERENT, STRUCTURAL ART. III INTERESTS THAT TRANSCEND THE NARROW INTERESTS OF AN INDIVIDUAL PARTY

Respondent's argument concerning the inherent Art. III structural issue raised in Point II of petitioner's opening brief—which the Court need not consider if it decides the case on the aforementioned narrower grounds —is premised upon a fallacy. Respondent, citing *Schor*, argues that a felony voir dire delegation does not affect separation of powers, which it assumes is the only non-individual interest underlying Art. III, because "courts have been afforded the choice whether to make such assignments, and they reserve the authority to revoke those assignments at any time." Brf. 35. But courts have *not* been afforded such a choice, since Congress precluded such assignments. Congress recognized that the Art. III interests at stake in a felony trial, to paraphrase respondent's brief, "transcend[] the rights of individual litigants." *Id.* Such interests, as we have shown, do not entirely coincide with the Judicial Branch's own institutional concerns. *See* Pets. Brf. 32-35.

Undeterred by the lack of statutory authority respondent advocates a case-by-case evaluation of whether the defendant asked for and received adequate district court review of discrete errors his counsel was able to identify at trial. This approach would collapse the structural and personal-right components of Art. III. In essence, the Art. III inquiry would be whether the defendant was denied due process because discrete, prejudicial error went uncorrected. Carried to its logical extreme, respondent's argument would permit a district judge to assign an entire felony trial to a magistrate. So long as the district judge was able to "correct" whatever errors the defendant was able to identify, there would be no Art. III structural violation.

Gomez rejected such an approach. It recognized that voir dire is far more than an "administrative impanelment process" at which jurors who willingly admit their biases are excused. "[N]o transcript can recapture the atmosphere of the *voir dire*, which may persist throughout the trial." 490 U.S. at 875. Most of what occurs at voir dire is subject neither to review nor to correction. *See* Pets. Brf. 23-29.

Even the type of objection at petitioner's trial that respondent argues could have been reviewed by the district judge—the magistrate's excusal over petitioner's objection of a juror challenged by the government for cause—proves our point. Brf. 32. Once the magistrate excuses a prospective juror, the juror would return to the jury pool and possibly be selected for another jury. Thus, it would not be possible to correct the magistrate's error. Even if available for additional questioning by the district judge, the juror surely would be placed "on the defensive." *Gomez*, 490 U.S. at 875 n.29. Additionally, the court, without being present when the magistrate evaluated the juror's appearance and demeanor, could not fairly second-guess the magistrate's decision.

Respondent advances the dubious argument (Brf. 33-34) that voir dire is adequately reviewable because a defendant may interrupt the district judge to ask for his or her immediate personal intervention to correct a magistrate's error. A felony defendant facing trial and possibly sentencing before a particular judge—in petitioner's case, a possible life sentence—would hardly seek such relief, absent an outrageous error, knowing that the judge had delegated voir dire precisely because he

was too busy or did not want to be bothered. Such a review procedure certainly would not save the judge time to devote himself to more "important" tasks.

This Court did not take a fact-specific approach in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), or in *United States v. Raddatz*, 447 U.S. 667 (1980). In both of those cases, the Court evaluated the inherent sufficiency of whatever independent review procedures were authorized by statute together with the nature and the importance of the delegated Art. III function. Such an analysis, yielding bright-line rules concerning what traditional judicial functions may be delegated to non-Art. III officers, is essential to provide guidance to Congress and to the lower courts. Contrary to respondent's argument (Brf. 26-28), lesser misdemeanor or petty offense prosecutions, or essentially private civil disputes, do not necessarily have to fall on the same side of the line as felonies.[8]

[8] Respondent (Brf. 26-27 n.12) misconstrues the position we advanced in our opening brief (pp. 34-35 n.19) concerning civil and misdemeanor trials. We did not contend that magistrates "always" may preside at such proceedings with the litigants' consent, but merely that there are reasonable grounds upon which the Court could distinguish such proceedings from felonies if it were so inclined. As reflected in the federal statutes and rules discussed in our opening brief (pp. 32-33)—and ignored by respondent—a federal judge, as a general rule, is far more involved in protecting societal interests during a government-sponsored criminal prosecution than he is while refereeing a civil dispute between private parties. Felonies are well understood to involve more serious interests than misdemeanors. *Cf. Blanton v. City of North Las Vegas*, 489 U.S. 538, 541 (1989) (the severity of punishment provided for by statute reflects the legislature's " 'judgment about the seriousness of the offense' ") (quoting *Frank v. United States*, 395 U.S. 147, 149 (1969)). The line-drawing process, "although essential, cannot be wholly satisfactory, for it requires attaching different consequences to events which, when they lie near the line, actually differ very little." *Duncan v. Louisiana*, 391 U.S. 145, 161 (1968) (drawing line at six months punishment for when trial by jury is required). The Framers overcame a parallel problem, choosing to protect the right to trial by jury in criminal but not in civil cases under Art. III, and distinguishing between felonies and misdemeanors with respect to the requirement of grand jury indictment under the Sixth Amendment.

In sum, whether this case involves a jurisdictional defect, a nonwaivable personal right, or a personal right that may be waived only under the strict *Johnson v. Zerbst* standard, petitioner may raise the error in this Court even though he lodged no contemporaneous objection. No showing of substantial prejudice must be made to obtain review on the merits since the error is reviewable without regard to the plain error rule.

CONCLUSION

Petitioner's conviction should be reversed and a new trial ordered.

Respectfully submitted,

JOEL B. RUDIN
MASS & RUDIN
598 Madison Avenue, 15th Floor
New York, New York 10022
(212) 753-8700

RICHARD W. LEVITT
148 East 78th Street
New York, New York 10021
(212) 737-0400

JOEL BRENNER *
76 Tompkins Street
East Northport, New York 11731
(516) 757-9189

Counsel for Petitioner

* Counsel of Record

April 1991